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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

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HON. STEVEN H. RODDA, JUDGE, DEPARTMENT 44/1

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LAURENCE LUCIER and LAURIE LUCIER,)
)
Plaintiffs,)
)
-vs-) No. 02AS01909
)
PHILIP MORRIS INCORPORATED, and,)
R.J. REYNOLDS TOBACCO COMPANY)
)
Defendants.)
)

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REPORTER'S DAILY TRANSCRIPT OF PROCEEDINGS AT JURY TRIAL

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WEDNESDAY, JANUARY 15, 2003

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APPEARANCES:

For the Plaintiffs:

PAUL & JANOFSKY
By: GARY M. PAUL,
Attorney at Law
1401 Ocean Avenue, Suite 200
Santa Monica, California 90401-2103

MARY ALEXANDER & ASSOCIATES
BY: MARY ALEXANDER,
Attorney at Law
44 Montgomery Street, Suite 1303
San Francisco, California 94104-4612

WARTNICK, CHABER, HAROWITZ & TIGERMAN
BY: ROBERT M. BROWN,
Attorney at Law
101 California Street, Suite 2200
San Francisco, California 94111-5802

---o0o---

THOMAS B. HENNESSY, CSR No. 5179
MICHELLE K. MADRID, CSR No. 11401

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APPEARANCES (Cont'd):

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For the Defendant Philip Morris Incorporated:

SHOOK, HARDY & BACON
By: GERALD V. BARRON, Attorney at Law
By: STEPHANIE A. SCHRANDT, Attorney at Law
By: ANNIE Y.S. CHUANG, Attorney at Law
333 Bush Street, Suite 600
San Francisco, California 94104-2828

SHOOK, HARDY & BACON
By: DEBORAH A. SMITH, Attorney at Law
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105-2118

For the Defendant R.J. Reynolds Tobacco Company:

JONES, DAY, REAVIS & POGUE
By: THEODORE M. GROSSMAN, Attorney at Law
By: STEVEN N. GEISE, Attorney at Law
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190

JONES, DAY, REAVIS & POGUE
By: DANIEL J. McLOON, Attorney at Law
555 West Fifth Street, Suite 4600
Los Angeles, California 90013-1025

JONES, DAY, REAVIS & POGUE
By: HAROLD K. GORDON, Attorney at Law
222 East 41st Street
New York, New York 10017

JONES, DAY, REAVIS & POGUE
By: ELIZABETH P. KESSLER, Attorney at Law
41 South High Street, Suite 1900
Columbus, Ohio 43215

---o0o---

THOMAS B. HENNESSY, CSR No. 5179
MICHELLE K. MADRID, CSR No. 11401

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E X H I B I T S I N D E X

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Plaintiff's No.	Description	I.D.	I.E.
8004	Project LF Potential Year 1 Marketing Strategy - Youth Target, 10-15-87	8783	
8005	On Tobacco Working Group Participation, 03-29-72	8803	

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Defendant RJR

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No.	Description	I.D.	I.E.
AN-001373	Memorandum from Colby to Senkus Re: Monthly Research Report	8884	8885
AN-002478	"If You Smoke," H.E.W., Public Health Service	8868	----
AS-000830	Memorandum from Menz to Hillman Re: Safeguarding of RJR Proprietary Information	8881	8884
AS-000858	Memorandum from Miller to Parks Re: Project LF Positioning	8815	8816
ASP-000034	Memorandum from Colby to Senkus Re: Monthly Research Report Science Info, 1967, No. 7	8886	8886
ASP-000035	"Departmental Plans for Research Department as Related to 10-yr. Forecast: 1968-1977"	8886	8887

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E X H I B I T S I N D E X

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Defendant RJR

No.	Description	I.D.	I.E.
AZ-008222	American Cancer Society re: "The Less Tar & Nicotine You Inhale the Better"	8867	
AZ-008920	Memorandum re: Project LF Summary, 9-11-87	8817	8817
AZ-008921	Memorandum re: Project LF Summary, 10-23-87	8818	8819

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WEDNESDAY, JANUARY 15, 2003

(Morning Session)

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The matter of LAURENCE LUCIER and LAURIE LUCIER, et al, Plaintiffs, versus PHILIP MORRIS INCORPORATED, et al., Defendants, Case No. 02AS01909, came on regularly this day before the Honorable Steven H. Rodda, Judge of the Superior Court of the State of California, for the County of Sacramento, Department 44/1 at 9:00 o'clock a.m.

The Plaintiffs, LAURENCE LUCIER and LAURIE LUCIER, were represented by: GARY M. PAUL, Attorney at Law; MARY ALEXANDER, Attorney at Law; and ROBERT M. BROWN, Attorney at Law (not present).

The Defendant PHILIP MORRIS INCORPORATED was represented by: GERALD V. BARRON, Attorney at Law; STEPHANIE A. SCHRANDT, Attorney at Law; DEBORAH A. SMITH, Attorney at Law; and ANNIE Y.S. CHUANG, Attorney at Law (not

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present).

The Defendant R.J. REYNOLDS TOBACCO COMPANY was represented by: THEODORE M. GROSSMAN, Attorney at Law; HAROLD K. GORDON, Attorney at Law; ELIZABETH P. KESSLER, Attorney at Law; DANIEL J. McLOON, Attorney at Law, and STEVEN N. GEISE, Attorney at Law.

The following proceedings were then had:

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THE COURT: Good morning. What's the situation?

MR. PAUL: Your Honor, it's not a problem. The scheduling has been changed for a variety of reasons

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overnight.

I just want to alert the Court to one issue.

We have not yet decided -- We have not gotten into the nonsuit motion at this point.

THE COURT: Right.

MR. PAUL: I don't anticipate any probation, frankly, with a need to reopen.

If, however, I was required, based on their nonsuit motion, there is some question what it allegedly covered, I would ask to reopen.

If I am going to reopen, I would need to recall Dr. Townsend, who obviously has knowledge about what was going on at RJR. So at the end of his testimony, I advised Mr. Gordon this morning and also Mr. Barron, at the end of his testimony, I will not be releasing him. I wish him to remain under the Court's authority to be recalled, if necessary. If it's necessary for me to reopen.

THE COURT: Okay.

MR. GROSSMAN: Your Honor, I think it's pretty easy -- First of all, it was agreed by everyone, I think, that our motion for a nonsuit would be without prejudice to

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our putting on Dr. Townsend who covered a good deal of what's covered by this nonsuit motion because he is our witness for, for cigarette design.

And there should be no reason -- There would have been no reason, and there should be no reason now for plaintiffs to consider that they want to put on a different case than the case they put on in chief.

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Secondly, and -- You know, equally as important. Dr. Townsend has been here -- From the time he came to get ready in case he was going to go on, he has been here over a week. He has changed his schedule innumerable times.

The last change he made was to be able to leave today. A plane has been sent for him, because he must be back in Winston-Salem tomorrow.

If necessary, he could go into what the meetings cover. But he's executive vice-president of the company for research and development, and the there are meetings that he has to attend tomorrow. And a tremendous amount of work has been put aside for this.

Due to our witness, Dr. Parisky, we lost one day with him. That -- That's because of Dr. Parisky, who's our witness. I understand that.

But Dr. Townsend first took the stand last Thursday?

THE WITNESS: Last Wednesday.

MR. GROSSMAN: Wednesday. He was on Wednesday afternoon, late Wednesday afternoon, he was on -- Thursday night, spent most of a full day with him, and then part of Friday that I spent with him.

He spent the rest of Friday with the plaintiffs; he was on all day Monday with the plaintiffs. Plaintiffs are still cross-examining him. They've already had as many

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hours as I did.

The -- He's here all day. We've arranged for him to be here all day, but he can't be here any longer.

You know, we can argue the motion whenever we argue

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the motion, but those things have nothing to do with each other.

(A brief discussion was held off the record between Mr. Grossman and Miss Kessler.)

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THE COURT: Well, I don't really think that I need to address this issue at this time.

MR. GROSSMAN: And may I say that, also, your Honor, plaintiff's have had our papers since last Monday, before he took the stand.

So for -- So I view this, in addition to everything else, as an ambush. They've had plenty of time to come in and discuss this with us if they wanted to discuss it with us.

THE COURT: Well, you folks discuss it, discuss it informally, if you choose to; I would encourage that during the day. And then, you know, if you can come up with something, fine; if not, I'll make the call there and when there's a need for it.

Are the jurors here?

THE COURT ATTENDANT: No, your Honor; we're missing two.

MR. GROSSMAN: Hard to park today, your Honor.

THE COURT: I know.

Anything else before we proceed? Okay. So as soon as they're here, we'll get going.

(A short break was taken in place.)

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THE COURT: Okay. Bring the jury in, please.

(The jurors are brought in at 9:15 am.)

THE COURT: Good morning.

(All say "good morning.")

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THE COURT: Okay, Mr. Paul.

MR. PAUL: Thank you very much, your Honor.

TESTIMONY OF

DAVID TOWNSEND, Ph.D., a witness called by Defendant RJR:

CROSS EXAMINATION (Continued)

BY MR. PAUL, Counsel for the Plaintiff:

Q. Dr. Townsend, how are you?

A. Fine, thanks.

Q. Dr. Townsend, when we left off, we were talking about, we had talked about a couple things, in particular nicotine, and then we talked about the human smoking machine. And I want to sort of tie a couple these things together.

Do you remember we were sort of discussing those things when we broke?

A. Yes, I do.

Q. You talk about Dr. Hoffmann in your direct, and also your cross, as someone that you respect, correct?

A. Dr. Hoffmann is a good scientist, yes, I do respect his science.

Q. Okay. And we touched on this a little bit. In fact, Dr. Wynder and Dr. Hoffmann wrote a book together, correct?

A. Yes.

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Q. And this book, this text is something that you've come to rely upon and --

I'll just leave it at that, right?

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A. There's quite a lot in that, in there, that I rely upon as good scientific information.
Q. Okay. One of the things that Dr. Hoffmann has comments about, and has commented about is the fact that -- And we touched again upon this briefly -- The connection between nicotine and nitrosamines. Do you remember we discussed that a little bit the other day?
A. We did, because nitrosamines are actually produced from reactions from nicotine.
Q. One of the things that Dr. Hoffmann stated was that one of those nitrosamines, N.N.K. is carcinogenic, correct?
A. It is, and it's believed to be a carcinogen. Studies have been conducted with rats where tumors are produced.
Q. And one of the things that Dr. Hoffmann did was he came up with, for want of another term, something called a nitrosamine theory regarding the connection between smoking and cancer, correct?
A. Well, I think Dr. -- Basically, yes. Dr. Hoffmann has done a lot of studies of nitrosamine, specifically tobacco-specific nitrosamine; he has developed a theory about certain nitrosamines, particularly N.N.K., as you point out.
Q. And one of the things that he talked about is, it therefore becomes important to try to drop the level of nicotine in tobacco, correct?

A. That's one approach to reducing nitrosamines, if in the curing process, you make, you minimize nitrosamines as well.
Q. Okay. And there has been some discussion of whether nicotine itself is carcinogenic, correct?
A. Oh, there's been quite a hot of discussion over many years. I think there have been many studies trying to

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determine whether nicotine is carcinogenic by itself, and medical science today believes that it is not.

Q. Okay. And so that's why -- Some of these theories have sort of switched to this concept of nitrosamines, correct? As being the carcinogen-causing agent?

A. Well, I'm not sure I understand your question.

Q. Well, the reason people have been looking at nicotine and whether it's a carcinogen is because they see nitrosamines as being carcinogenic, and then the question arises, well, is nicotine itself carcinogenic, correct?

A. No, I don't think that's correct. I think scientists have asked the question about nicotine and whether or not it's carcinogenic long before our state of knowledge about nitrosamine.

Q. And for how long has RJR been monitoring the nitrosamine levels in cigarettes?

A. You mean actually measuring.

Q. Yes.

A. For tobacco-specific nitrosamines we developed analytical test methods back in the late '70s, thereabouts. It's a very difficult measurement to make, because

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nitrosamines are very reactive molecules.

Q. And so the information, for example, in Winston cigarettes about the levels of nitrosamines would not have been available until the '70s?

A. We didn't have a test method, and I don't think anybody had a reproducible test method until about that time. Many nitrosamines, not the tobacco-specific nitrosamines, but volatile nitrosamines, there were measurements early on, and we had measured that.

Q. One of the things that you can do with cigarettes is

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adjust the level of nicotine, correct?

A. It's possible to adjust the level of nicotine in cigarettes; that is correct.

Q. You can adjust it up, or you can adjust it down, correct?

A. That is correct. There are technologists that would allow you to do both.

Q. Okay. You can adjust nicotine down to almost a zero level if you want to?

A. It's entirely possible to reduce nicotine level to where it's very, very low.

Q. Okay. The problem is that when you do that, then the product doesn't do as well on the market, correct?

A. What we've found and what our competitors in particular have found is that very low nicotine-yielding cigarettes are not consumer-acceptable.

Q. Because the consumers want the nicotine, correct?

A. I think that's a major part of why people smoke.

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It's not the only reason.

Q. Okay. Now to sort of bring this full circle, this is sort of what Dr. Claude Teague was saying back in 1973, or '72 correct?

A. What was Dr. Teague saying? What are you suggesting?

Q. That nicotine is what drives the sales of cigarettes, correct?

A. Well, in essence that is what Dr. Teague was saying. Dr. Teague believed that nicotine was the only reason people smoked, and I disagree with Dr. Teague on that.

I do think that it -- That it is a very important reason, however.

Q. All right. One of the concerns that was raised by Dr. Hoffmann in the nicotine issue, the nitrosamine issue

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especially, is the fact that it was driving the development of adenocarcinoma of the lung, correct?

A. His speculation -- Basically, that's right.

His speculation was that nitrosamines, and in particular N.N.K., might be related to the increase in adenocarcinoma incidence in the United States.

Q. He wrote papers about that, didn't he?

A. Yes.

Q. He talked about the fact that one way of trying to reduce the increase of adenocarcinoma of the lung for males and females is to reduce the levels of nitrosamine in cigarettes through the reduction of nicotine, correct?

A. I think that was one approach that he and others had talked about; you know, if you reduce the level of nicotine

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after nitrosamines are formed, you wouldn't be successful in -- In reducing the nitrosamine level because nitrosamines are formed during curing. So if they're formed during curing and then you do some process, like removing the nicotine through some tobacco-processing method, then it will still leave the nitrosamines but remove the nicotine.

So what you really have to do is develop a tobacco plant that produces very little nicotine and carefully control the curing in order to reduce nitrosamine levels.

Q. Now, RJR has been familiar with some of these discussions, and the designers there, of cigarettes, for a number of years, right?

A. The discussions about --

Q. Nitrosamines?

A. Adeno- --

Q. Adenocarcinoma, yes?

A. Yes.

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Q. So it is important, as a designer, since you -- Once you minimize the risk of people getting adenocarcinoma, to reduce the nicotine in cigarettes and thereby, whatever method you can, reduce the nitrosamines in cigarettes, correct?

A. Part of what -- Part of your question is correct; part is not.

The most practical way to reduce nitrosamines is not to reduce nicotine but rather very carefully to control the curing process. The tobacco that comes out of the field has no tobacco-specific nitrosamines.

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One it's cured it does have tobacco-specific nitrosamines. So the idea is to figure out how those nitrosamines are formed during curing and to prevent their formation. And that's exactly what we did with flue-cured tobacco, and that's what we're working on with Burley tobacco today.

Q. But what you know from what documents we've looked at and the things that we've gone over the last couple days is that, in fact, what RJR was doing was trying to increase the levels of free nicotine, where the amount of nicotine a smoker got, inhaled, to compete with Marlboro -- Correct?

A. No. You've completely misunderstood, I think, what we've said and also the document.

Marlboro -- And I suppose you're referring to that last document we talked about? Comparing Marlboros, versus Winston?

Q. Sure, I could put it up, make it easier.

A. Okay, that would be fine.

Q. This is Exhibit 8011.

Did you have a chance to look at this document the last day or so?

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A. No, I haven't.
Q. Okay.
A. I think that's the wrong document.
Q. No. It's the one I want to look at. I'm not sure which one you want to look at.
This is 8011, which is a summary of 1986 smoking behavior research, from Norman to a variety of people.

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A. Okay. We're getting confused. I guess I need you to ask me a question then.
Q. Okay. So if I can.
This document was talking about smoking behavior and comparing Marlboros and Winstons. Do you remember that?
A. Yes. Slightly different than the line of discussion that we were just having, but, yes.
Q. Let's see if we can get there.
But it talks about puffing behavior and talks about Marlboro smokers tend to take larger-volume puffs.
Do you see all that?
A. Yes.
Q. Now, this is an RJR document, correct?
A. I assume it is.
Q. And then we sort of touched on the first one here, smoke-delivery replication results. And this is the one we sort of talked about:
"Tar deliveries as measured with the Human Mimic Smoking Machine, H.M.S.M., were increased relative to the standard S.P.C. method by 22 percent. So the F.F. product" -- which means "full flavor" -- "67 percent for the F.F.L.T. product" -- which means light cigarettes -- "And by 400 percent for the U.L.P. or ultra-light

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product.

"Nicotine deliveries were also greater than F.T.C. values, but the increases were not as large as for tar. Puffing behavior changes" -- And

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then we said that we had some trouble with that word -- "The nicotine concentration, T, slash, N ratio in the smoke."

Do you remember we talked about this subject before, and we'll talk about it again, because this also has to deal with compensation, doesn't it?

A. This does deal with the subject of compensation, yes.

Q. All right, going down: "Blood nicotine results". Do you see that?

"The maximum change in blood nicotine concentrations which occur during smoking was the same for male Marlboro and Winston smokers when smoking either Marlboro or Winston."

In other words, in this point in time, in 1986, when comparing Winston or Marlboro, what they were seeing is that the Marlboro and Winston smokers were not getting the same concentration of nicotine in their blood, correct?

A. By this measurement, yes.

Q. Okay. And you remember we looked at memos previous to this saying what do we need to do to catch up to Marlboro? We're lagging behind them. And one of the things that they talked about was the concentration of nicotine that the smoker was getting, correct?

A. I think they talked a lot about the yield of nicotine and the yield of tar.

As I looked at that document several days ago, there were charts in there showing that Marlboro in fact had substantially lower tar and nicotine yield than did Winston.

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And Winstons was judged by our smokers to be stronger and harsher and hotter and more irritating. So the main purpose of that research that your referring to was to reduce the tar and nicotine levels in Winston.

Q. All right. Let me show you exhibit -- You've seen this one before, Exhibit 8014, which is in evidence.

Do you remember this was the exhibit that went from Mr. Blevins to Mr. Smith in July of 1973? Do you remember this exhibit?

A. I do.

Q. When we look at this exhibit, in the second paragraph or first paragraph, "Free nicotine does help explain the differences in performance between Winston, Marlboro, Salem and Kool but not all the differences."

And then it says: "We have reviewed free-nicotine advertising expenditures in 100 millimeter spinoff data for Winston, Marlboro, Salem and Kool since 1963 to 1972 and found that the difference in share performance of the 85-millimeter styles of each brand is affected by all of the above factors independently and collectively."

What they're saying in part -- And then it goes on to talk about the variability due to free nicotine was significant, and its correction was over and above that of advertising expenditures in ten-millimeter spinoffs.

In other words, what they're saying is: In looking at the difference between Marlboro and Winston was the amount of free nicotine. That was the most significant factor.

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Now this is in 1973, correct?

A. This document is in 1973.

Q. Yet the document we looked at 13 years later, in

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1986, basically says, "We have caught up in the amount of nicotine that is inhaled by the smoker of both Winston and Marlboro." Correct?

A. No, that's not correct. That document, altogether says: We have caught up with Marlboro; we've reduced the yields of tar and nicotine. The tar-to-nicotine ratio has come in line with Marlboro as well. It did speak to free nicotine, which is simply a calculated number.

Q. Now, to bring this thing full circle, if we go back to what Claude Teague said -- This is Exhibit 56, entitled "The Nature of the Tobacco Business and the Crucial Role of Nicotine Therein" -- Dr. Teague said, on page one: "In a sense the tobacco industry may be thought of as being a specialized, highly ritualized and stylized segment of the pharmaceutical industry. Tobacco products uniquely contain and deliver nicotine, a potent drug with a variety of physiological effects.

"Nicotine is known to be a habit-forming alkaloid" -- yeah, alkaloid -- "Hence, the firm user of tobacco products is primarily seeking the 'physiological satisfaction'" -- that's in quotes -- "Derived from nicotine."

It goes on to say, "Thus, a tobacco product is, in essence, a vehicle for delivery of nicotine, designed to deliver the nicotine in a generally acceptable and attractive form.

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"Our company's position in our industry is determined by our ability to produce dosage forms of nicotine which have more overall value -- Value, tangible or intangible, to the consumer than those of our competitors."

That is what was going on when Winston, RJR, was trying to match Marlboro and come up with the same kind of levels that Marlboro was putting out to their customers,

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correct?

A. No, that's absolutely not correct.

What was going on was to move Winstons down in tar and nicotine yield to the levels that Marlboro was exhibiting, because Marlboro was doing extremely well in the market.

Q. The doctor went on to say: "If nicotine is the sine qua non of tobacco products and tobacco products are recognized as being attractive dosage forms of nicotine, then it is logical to design our product and, where possible, our advertising around nicotine delivery, rather than tar delivery or flavor."

Now there's a connection between tar and nicotine; is there not?

A. Tar and nicotine generally parallel each other.

Q. Okay. To parallel each other, if you're going to keep the tar level up, you have to tip the nicotine level up?

A. Unless you do something else, yes.

Q. They have to be in a certain combination, so if you, quote, "want more flavor", you've got to have more nicotine

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right?

A. No. Flavor and nicotine don't necessarily go together.

Most of the flavor compounds are in the tar.

Q. Well, if the tar is connected do the nicotine by a ratio, when you increase the tar, the ratio requires that the nicotine go up as well, right?

A. I'm just trying to be very, very rigorous here. You were suggesting, I thought, that nicotine carries flavor, and it doesn't really. Most of the flavor compounds are

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present in the tar.
Q. I understand that. The answer to my question would be, yes, as the tar level goes up, the nicotine level goes up, correct?
A. I'm not sure that that's the question that you asked me, but what you just asked me is generally correct.
Generally, in a cigarette, as the tar levels are higher or lower, the nicotine is higher or lower.
Q. And then he says: "The factors which induce a pre-smoker or nonsmoker" -- Now, you said that no one had ever used that term "pre-smoker"?
A. No. The only time I had ever seen the term "pre-smoker" is in Dr. Teague's document.
Q. "Pre-smoker or nonsmoker", goes on to say: "Rather he starts to smoke for purely psychological reasons, to emulate a valued image, to conform, to experiment, to defy, to be daring, to have something to do with his hands and the like.

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"Only after experiencing smoking for some period of time do the physiological satisfaction," end quote, "and habituation became apparent and needed."
That is a true statement; is it not?
A. I don't really know why people begin to smoke, so I don't know.
Q. As a cigarette designer, you've never done an analysis as to why people begin to smoke?
A. No, no. I'm a scientist. I think there are a number of speculations by various people that there are social reasons why people begin to smoke. I don't know.
Q. The doctor goes on on the next page to say: "And, of course, in our present advertising climate, our opportunity to talk to the pre-smoker are increasingly limited and,

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therefore, increasingly ineffective."

Now, on page six, he says, "If, as proposed above, nicotine is the sine qua non of smoking, and if we meekly accept the allegations of our critics and move toward reduction or elimination of nicotine from our products, then we shall eventually liquidate our business."

That is a true statement; is it not?

A. I think if we eliminate nicotine from cigarettes, they're not commercially acceptable, and we wouldn't sell cigarettes.

Q. So what the good doctor said in 1972 was a true statement? That statement is correct?

A. That specific statement, that if you eliminate nicotine we would not sell cigarettes, because they're not

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acceptable to smokers.

Q. And in spite of what Dr. Hoffmann said, no attempt to eliminate nicotine from RJR cigarettes, correct?

A. Yes, we've made attempts to develop cigarettes with extremely low levels of nicotine.

One of our competitors introduced a product that had high tar and very, very low nicotine, almost immeasurable levels, and we undertook an experimental program to develop prototypes to do the same thing. What we saw was our competitor failed in the market; those products were not accepted by smokers. We have done experiments in that area.

Q. Would it be correct then that a decision was made that RJR will continue to put out what it knows is a more risky product, rather than go to a safer product?

A. More risky in what sense? I don't understand.

Q. Well, I think you accept that nitrosamines are more risky, right?

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A. I think nitrosamines certainly are potential risks. I think there are at least a couple of them that are believed to be carcinogenic.

Q. And one of the things that Dr. Hoffmann said you can do to eliminate or minimize this problem is to eliminate nicotine, but RJR, you as an executive vice-president, made a conscious decision not to do that, correct?

A. Look, we made a decision. Particularly after that experience I just cited that our competitor undertook, we made a decision that very-low-nicotine cigarettes were not consumer-acceptable. We also scientifically believed that

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it didn't make sense because the problem with cigarette smoking, the health problem with cigarette smoke is in the tar; it is not nicotine. So keep a high level of tar and minimizing the nicotine to almost nothing doesn't make sense in terms of making a safer cigarette.

Now, Dr. Hoffmann -- To answer your question specifically, Dr. Hoffmann is absolutely right that nitrosamines need to be reduced or eliminated in smoke. Dr. Hoffmann's hypothesis that eliminating nicotine as the way to do it is not a practical way.

The way to eliminate nitrosamines or to reduce them greatly is to manage the curing process; we talked about that several days ago. And Reynolds has been successful in reducing the nitrosamine level in more than 90 percent in flue-cured tobacco.

Q. And could you tell this jury that those levels of nitrosamines does not cause adenocarcinoma?

A. I don't know that I said they don't cause adenocarcinoma. I don't know.

Q. You don't know?

A. I don't know.

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Q. Okay.
A. What I do know is that we've reduced the levels tremendously.
Q. But you don't know what effect it has?
A. We've done several biological assays of cigarettes with different nitrosamine levels, and we don't see differences in those biological end points. But

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nitrosamines are considered to be bad compounds in smoke. And we've done everything we can to reduce them, and we've been very successful. So it's the right thing to do, whether you can prove it or not.
Q. All right. We talked about nitrosamines, wanting to potentially reduce that to lower the risk.
The other area that you have to -- One of the other areas to concentrate on is to lower the tar to lower the risk, correct?
A. Yes.
Q. And so over time, as you've demonstrated to the jury, tar levels in cigarettes have come down; isn't that correct?
A. Yes, there's been a major reduction in both tar and nicotine over the years as a result of general reduction.
Q. Right. And that reduction started when, in the late '50s, correct?
A. Well, I think it started, actually, yeah, mid-'50s or thereabouts.
Q. So the idea of making a, for want of another term, a more safe cigarette -- The ability to reduce the tar in the cigarette existed before 1960, correct?
A. To a degree. There were a number of techniques, particularly the use of filters and more porous cigarette papers that were in place in the market before 1960.

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Q. In fact, I think you showed us a chart. One of the charts you showed, which is Demonstrative 506 -- Which basically shows that filter tip and reconstituted tobacco that came in around 1954, and then paper additives and paper

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porosity in 1958 -- And so the tar levels in cigarettes -- This is called tar yield and nicotine yield -- Came down during the period starting from -- It looks like about 1957, it increased through '58, '60, '62, '64, started to level off a little bit in like '66, correct?

A. No. It's actually -- The rate of decline was less in that period of time into the early '70s. I think it leveled off around 1980 to '82, and it's been relatively constant since then to today.

Q. So RJR had the capability, the knowledge and the technology in that period of time, '58 to '66, to make a safer cigarette, didn't they?

A. I think we developed a number of technologies to reduce the tar and nicotine yields that ultimately do reduce the risk of smoking.

Q. So the answer to my question would be "yes"?

A. Yes.

Q. Now, I want to talk about compensation for a second. For a lower-tar cigarette, to be effective, R.J. --

That's not your phone is it?

MS. ALEXANDER: I turned mine off.

MR. PAUL: It's not hers. She's innocent.

Q. For a lower-tar cigarette to be effective, it's going to be necessary that the smoker not compensate or take in more tar by the way they smoke the cigarette; would that be a true statement?

A. Basically, that's true.

I would put it this way: For a lower-tar cigarette

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to reduce the risk, or even potentially reduce the risk, the smoker needs to get less. The basic tenets of toxicology is less ought to be better.

Q. Right. And one of the things that RJR knew, you know, as a cigarette designer is that people do compensate when they go to lower-tar cigarettes, correct?

A. I think -- Yes, when smokers switch to lower-tar cigarettes, they do compensate to a degree. I think the bulk of the evidence suggests that smokers, most smokers don't compensate completely, though.

Q. And so as a designer of a cigarette, you have to have this knowledge in hand, so that when you're saying to yourself, okay, I am going to design a lower-tar cigarette, but it doesn't do me any good if the person compensates and gets not exactly the same amount they would get out of a full-flavored cigarette, but they take away a lot of the advantage of the low-tar cigarette if they're compensating, correct?

A. I think if their compensation were 100 percent, that they completely compensated, then that would take away the advantage.

I think people -- The bulk of the evidence again shows that compensation does occur -- It is not complete -- and that smokers as a group who smoke low-tar cigarettes, in particularly low-tar cigarettes, are exposed to less.

Q. All right. One of the things that RJR knew when they developed these low-tar cigarettes is that people did compensate. They knew that early on, didn't they?

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A. I think scientists at Reynolds and scientists around the world knew that there was compensation occurring; I think there were a number of laboratories studying the

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phenomenon of compensation.

Q. And it's correct, is it not, that the studies that were going on in RJR about compensation were not provided to the Surgeon General?

A. I don't know of a case --

MR. GROSSMAN: Objection, your Honor, on which studies?

MR. PAUL: On compensation.

THE COURT: You can answer that.

THE WITNESS: I don't know of a case where scientists from Reynolds or the Reynolds Company actually presented to the Surgeon General the results of compensation or smoker-behavior studies.

I do know that we published some of that information, made it available in the scientific literature. Other scientists have done that as well. This is not a secret.

Q. BY MR. PAUL: The answer to my question is: Even though you had the information, you never presented it to the Surgeon General, correct?

A. I don't know of a case where we went to the Surgeon General and said, here's the results of our smoker-behavior studies.

Q. All right. And you knew the Surgeon General was looking into this question of compensation, didn't you?

A. The Surgeon General and many others were looking into

it, yes.

Q. The other thing that Reynolds became aware of is that the F.T.C. method of measuring tar and nicotine was not an accurate measure of what the smoker was getting, correct?

A. That is correct. And we told the F.T.C. that. The F.T.C. knew that, and when the F. T. C. established their method in 1967, the F.T.C. even said that publicly.

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Q. And it seriously underestimates the amount of tar that a smoker is getting, doesn't it?

A. I don't know that it seriously underestimates. I think for most smokers, it's probably lower. I think there are some smokers that probably smoke in a way to get -- You know, much lower tar. As a group, smokers do tend to get more tar yield than as measured from the F.T.C.

Q. If we looked at that 1986 document that we were looking at before, about the human smoking machine --

By the way, when did Reynolds develop their human smoking machine?

A. I guess the original version was developed in, around 1979, '80, thereabouts.

Q. And it was -- The attempt of the machine was to try to, as best as possible, try to demonstrate what the average smoker, try to replicate what the average smoker was like, correct?

A. No. The purpose of the machine was to actually measure how a person smokes a particular cigarette and then replicate it on this computer-controlled smoking machine, so that you can estimate the amount of tar and nicotine that

that particular smoker got with that particular cigarette.

Now, if one takes hundreds and hundreds and thousands of people and do that, you could probably get an estimate for the, you know, for the population.

But what we get from that measure is for that one smoker with that one cigarette.

Q. Would you say that if the F.T.C. was -- F.T.C. method, that the human smoking machine demonstrated a 400-percent higher level of tar received by a machine for the ultra-light than the F.T.C. method, that it grossly

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under-estimated the amount of tar that the ultra-light smoker is getting?

A. In an absolute sense, it depends.

If the 400 percent is based on, say, a Now one-milligram, then compensation would take that one-milligram yield up to four.

Q. Right.

A. Which is, in an absolute tar yield, not a big change.

Percentage-wise it's a large change. So I think it depends on the starting tar yield.

Q. Well, I'm talking about estimates. If I decided I was going to spend, you know, $500 a year for gasoline, and I end up spending $2,000 a year, that would be a gross underestimate on my part, the $500, wouldn't it?

A. If you expected to spend five hundred and you spent 2000, in absolute terms, that would be a big difference to me.

Percentage-wise that's not such a big difference.

Well, that would be 400 percent, sorry. My mistake, I was a decimal off.

Q. I forgot my math there for a second.

It would be 400 percent, wouldn't it?

A. You're right.

Q. Now, given the fact that it was found that people were -- The smoking machine was demonstrating these kinds of differences, however you want to classify them, gross or otherwise, in what the actual person is getting while smoking, was something done to try to remedy the situation by saying, "Well, listen, people are going to get much more tar than we think; we ought to reduce the tar levels further, so that they are getting less tar."

Do you follow what I'm saying?

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A. Um, I think so. I think what we've done is developed a range of products that go to almost no tar yield under a -- someone smoking. And we've provided that range.

Now, individuals will smoke differently, and they will get different amounts. I would say, on the average, most smokers will get somewhat higher tar yield than the F.T.C. would indicate. But the relative ranking of those cigarettes stays the same, so if a person smokes an ultra-low cigarette, they still get less.

Q. Well, that's not exactly my question.

When you had a goal when you said, "Okay, we're going to make a low-tar cigarette," as a designer, normally you set design goals, don't you? "Here's what we want the criteria to be for this product, and our design goal is" --

Let's say if it's a car, we want it to get 30 miles to a gallon on the highway or 25, or if it's an S.U.V. -- Whatever the number is. Okay?

When you design a cigarette, when RJR was designing cigarettes, did they say, "Okay, 'low tar' for us means that we want to make sure that the user didn't get more than ten milligrams of tar from a cigarette"?

Was that the kind of goal that RJR sets?

A. No. We set design goals based on F.T.C., tar yield, and we set design goals paced on certain other things, you know, like consumer acceptance.

Q. All right. That's where I'm going.

So the goal -- We know that tar can be bad for health, so you want to reduce the tar.

So when you're setting a goal, did you decide, "If we reduced this tar level in a" -- we'll make it a light cigarette, which is ten milligrams, "that this will reduce

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the risk by blank percent"? Is that what RJR did?

A. No. The design goal did not include a particular target for risk reduction because you can't really quantitate that, given any measure that we have today, other than a prospective eppi study.

(Reporter's Note: Epidemiology Study)

Our targets are in fact based on a range of tar yield, and some of our products have tar targets of one milligram. Some have ten, some have 15, and that's as measured under the F.T.C.

Q. And how it is that the way you came up with the 15

didn't have anything to do with risk; it had to do with consumer acceptance, correct?

A. I think both things are factored in. Certainly, our goal is to reduce tar yield as much as possible and maintain consumer acceptance.

The 15 milligram is in fact a higher-tar-yielding product today, which is less than half, 12, about a 60 percent -- Well, 55 percent reduction from what it used to be.

Q. But the point is that you could have made, let's say -- You could decide we want our light cigarettes to be not above five milligrams. That's the number we want.

You could decide that, couldn't you?

A. Are you suggesting that we produce cigarettes below five milligrams and nothing more?

Q. I'm not suggesting anything; I'm just asking you if you could do it?

A. I'm just trying to understand your question. Could you rephrase it.

Q. All right.

Would you say -- Would you, as a designer of

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cigarettes, say that a five-milligram cigarette is safer than one that gives 15 milligrams of tar?

A. I believe a five-milligram safer -- A five-milligram cigarette probably is safer, because I think there's considerable evidence that ultra-low-tar smokers especially, but even light smokers, are exposed to less tar than high-tar cigarettes.

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Q. That was my question.

And if RJR wanted to, RJR could have said, "We want the five-milligram cigarette to be our low-tar cigarette; that's going to be what we call 'low tar'."

They could have done that; could they not?

A. Well, I think that's sort of what we did, except we called it "ultra low tar".

Q. The answer to my question is --

A. I guess I don't understand your question.

Q. Yeah, okay.

You can say ultra low tar is zero if you wanted to, couldn't you?

A. Well, you could define categories any way you want to, I suppose.

Q. We're going to put out our light cigarettes or low-tar cigarettes; you could have said, "We want it to be five for low-tar cigarettes?

A. Could you change the term "ultra low tar" to "low tar"?

Q. Right.

A. I think you could call it whatever you want to call it.

Q. These levels are all arbitrary?

A. The categories are arbitrary. They're arbitrary in

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that there are decisions among the current market and what's consumer-acceptable, but the divisions within the market are arbitrary.

Q. All right. One of the things that -- Well, go back

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to Dr. Hoffmann.

One of the things that Dr. Hoffmann has also hypothesized is because when people, when they get these low-tar cigarettes, they smoke deeper and get deeper cancer in the lungs, correct?

A. Dr. Hoffmann has hypothesized that smokers of very low-tar cigarettes will inhale more deeply and that the tar will get to the periphery of the lung.

Q. And he had epidemiologic or scientific or medical data to demonstrate that in papers, correct?

A. He had some data to support his hypothesis or, at least he thought, to support his hypothesis, and he's published that in numerous papers.

Q. And as a designer of a product, this is something that you must take into consideration when you design cigarettes, that these kinds of things are happening to smokers, correct?

A. As a cigarette designer, we developed the lowest-tar products that we can that are consumer-acceptable. I think Dr. Hoffmann's hypothesis is the source of quite a lot of discussion in the scientific community today. I don't know that there's any clear evidence that ultra-low-tar smokers in fact inhale diaper; they do compensate in the way they puff. They take larger puffs; they take puffs more often. But I don't know of any evidence that demonstrates that smokers actually inhale more deeply when they smoke low-tar cigarettes.

Q. So you think that this hypothesis is incorrect?

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A. I don't know whether it is or not. I think there's a lot of scientific discussion going on as we speak.
Q. Do you think -- well, let me ask it a different fashion.
Do you have any idea how many -- Well, what percentage of smokers of low-tar cigarettes compensate completely?
A. Compensate completely?
Q. Yes.
A. I don't. It wouldn't surprise me that there are some smokers that may compensate completely or even nearly completely.
But I have no idea how many. I think the low-tar smoking population as a group, however, there's pretty good evidence that they in fact get less.
THE COURT: We'll take a ten-minute recess. Please don't discuss the case.
(The jurors depart the courtroom.)
---o0o---
THE COURT: Okay.
MR. GROSSMAN: Your Honor, we have something that we would like to raise outside the presence of the jury.
THE COURT: Okay.
MR. GROSSMAN: Earlier, I raised -- We raised with the Court -- Actually, plaintiffs raised with the Court, that they would like to keep Dr. Townsend subject to recall.
Your Honor, after I discussed the issue, I suggested that we meet and confer.
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We have had the equivalent of not a meet and confer, but rather -- The ambush I was talking about before, during the break, plaintiff's served upon Dr. Townsend the trial

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subpoena. They didn't say a word to us before that.

Let me be as clear as I can about our position on this.

At the conclusion of the plaintiff's case, we -- And before the plaintiff's case concluded, we said to plaintiff, and we said to the Court, that we could not put on certain witnesses unless it were absolutely clear -- And the record is absolutely clear on this point -- Unless it were absolutely clear that it would be without prejudice to our pending motion that we were planning to file. Indeed, I think I even raised the point that, that we couldn't put on our design expert where the plaintiffs had not put in any evidence about the design of Winstons or about the comparative designs of the period or about whether better designs in some respects could have been marketed.

It was agreed by plaintiffs, and it was ordered by the Court, that our motion would be without prejudice, and that -- That is, that by putting on witnesses, while our motion was pending, that it would not be to the prejudice of our motion or to us.

This was done largely for the convenience of plaintiffs so that they would have plenty of time to respond to our motion.

Now, our motion was filed more than a week ago, a week and a half ago.

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Dr. Townsend has been on the stand for a week. And it is only now when Dr. Townsend clearly has to leave. The plaintiffs tell me they have only another hour of cross examination, approximately. It's only now when Dr. Townsend clearly has to leave, and when everyone recognizes that his testimony can be completed today, that they've served upon him a trial subpoena, without any discussion with us.

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Whatsoever. Notwithstanding that the Court suggested that we should discuss, that we should meet and confer.

This is improper conduct. It's an ambush. It's wrongful. It's against everything that the Court has ordered in this case already. It's against everything that the plaintiffs agreed to already.

This witness has to leave today. And he's got a lot of other business to do. He's devoted a week of his business, and of the business at Reynolds to his testimony. And wholly apart from that, from the standpoint of the litigation, it's wrongful; it's an ambush; it's against what we had -- Everything that we had agreed to when we had made the motion. And when the -- A note is being handed to me. People think that I've missed something. Let me be sure.

And I did. As Miss Kessler notes to me, plaintiffs wouldn't have been able to get such witnesses to court if we hadn't elected to call them during our case.

Plaintiffs did not issue a trial subpoena for Dr. Townsend during the course of their case. They -- Dr. Townsend doesn't live in California. All of the rest.

This is simply -- This is something, simply

something that goes way beyond and outside of every agreement that we've reached. And goes way beyond and outside of what's proper in this case. Dr. Townsend is on the stand. They can ask him the questions and now are asking him questions if they need to and want to. But he's got to go home. He's got to get back to his work. And he's got meetings tomorrow, and he's got things to do after that, things that have to be done in the company, things that have to be done with other companies, and things that have to be done with the Government. Things that have to be done.

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That's all I have.

THE COURT: Okay. So what's the ultimate request here?

MR. GROSSMAN: Well, it's to quash the subpoena, to quash the trial subpoena.

MR. PAUL: On what basis?

All I said was: I don't know what's going to happen on -- I don't think this is an issue at all, frankly, to be honest. I don't think the law requires what they're contending the law requires on state-of-the-art. The state-of-the-art is not a requirement in a products-liability case. I'm protecting my client. To say that I couldn't have put this witness on without him coming out here, that's not true.

I have his deposition; I could read his transcript. I could read his transcript from every case in this country into evidence if I wanted to. All I said, all I said was that I wanted to protect the record; if in fact I had to

reopen, I wanted to have the doctor available to be here.

I don't care when and if he comes back. I'm not trying to interfere with the schedule, but I've got to protect my client. I hear that he's going to be -- He's got a plane that's going to be landing at the airport, and he's going to be gone. I can't get him anymore once he takes off; he's outside my range.

I suppose that we can stipulate that the case is going to be reopened and all that stuff. I don't expect that to happen. I'm not trying to ambush anybody; I'm trying to protect my client. Nobody came up to me during the break and said, "Hey, Mr. Paul, let's work this out." If he wants to -- His -- If he says this is his testimony on state-of-the-art and let him go regarding that, I think

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we've gotten that in.

But we're jumping hurdles before we even got there. I'm trying to protect my client and not trying to ambush anybody. I would like to keep him on the stand.

THE COURT: Okay. I'm not going to address this until it's necessary and I have to.

Let's bring in the jury.

(The jury is brought in at 10:25 am.)

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THE COURT: Okay, Mr. Paul.

MR. PAUL: Thank you, your Honor.

Q. Doctor, when we broke, I was asking you about people who compensated completely. What I would like to do is read from Dr. Townsend's deposition -- I'm sorry, testimony --

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In the Minnesota case, taken April 2, 1998. Pages 10,522, line nine, through 10,523, line 21.

MR. GROSSMAN: No objection.

MR. PAUL: Thank you.

May I have the Elmo, please.

"QUESTION: What percentage of smokers, based on the totality of the studies, compensate completely?

"ANSWER: I don't know that I can answer that question.

"QUESTION: Simply don't know, do you, sir?

"ANSWER: I don't know the answer to your very specific, narrow question.

"QUESTION: You don't know if it's ten percent or if it's 75 percent, do you?

"ANSWER: Well, I think that's -- I think that's not a fair question. I've already told you

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that the average is not full compensation; it's somewhere in the middle.

"50 percent is full compensation?

"ANSWER: I don't know the answer to your specific, very narrow question. I really don't.

"If it's in the middle --

"QUESTION: If it's in the middle, it's 50 percent, correct?

"ANSWER: If the average of groups of smokers is in the middle between what the F.T.C. tar would reflect and -- Between no change, i.e., a U.L.T.

smoker would receive the same tar and same nicotine as a high-tar smoker -- If it were in the middle, I would term that 50-percent compensation.

"QUESTION: And how many smokers would that be? Tens of millions of smokers, wouldn't it?

"ANSWER: I don't understand you.

"QUESTION: How many would be compensating at that level if it was 50 percent?

"ANSWER: At which level, sir?

"QUESTION: 50 percent. How many would be compensating at that level among smokers?

"ANSWER: Well, I guess I'm struggling with your question, because I've already made it clear, smoking behavior is extremely variable, from smoker to smoker and even within smokers. Smoker's behavior changes even for themselves. I don't think we can sit here and define percentages because of the large variability. And that's my -- Question. And that's my --

"ANSWER: In the way -- "

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Q. Now, doctor, these are things that you take into consideration in the design of cigarettes; is it not, sir?
A. Smoker compensation?
Q. Yes.
A. No.
Q. Now, I want to shift gears just for a second. We talked briefly before about the rat lab, at RJR, and your

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knowledge about that. And Mr. Bumgarner's.

Do you recall that? We discussed that briefly?

A. I recall the discussion about the biological research division.

Q. Right. Now, you're aware, are you not, that that biological research division had -- They had results from their inhalation experiments on rats; did they not?

A. There were some results that they had developed trying to develop a test method for exposure to animals, particularly rat.

Q. They found in fact that when rats were exposed to smoking, that they developed emphysema; isn't that correct?

A. There was some concern about that, because they were trying to develop a method of exposure, and at least one piece of the study suggested it might be emphysema. I think it turns out that it wasn't, that it was the result of the actual exposure method.

Q. But they were making progress in results, weren't they?

A. They were making progress in trying to determine how to expose animals to smoke. Very difficult problem to solve. They were making progress in that. I don't think they got definitive results on, say, comparing different cigarette smokes and seeing what the differences were.

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Q. They were making progress. They were -- In the effort that they had been specifically part of, the effort that they had been specifically set up to do, which was to determine the connection between smoking and health,

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correct?

A. There -- If I understand your question, this charge was to develop test methods that could be used to compare cigarettes and examine the comparative risks as a tool for helping us design cigarettes that reduce risk.

Q. All right. And in 1970, that lab was shut down, correct?

A. It was either '69 or '70, thereabouts, that lab was closed.

Q. And 26 scientists were let go, correct?

A. I don't recall the exact number. That seems reasonable.

Q. And that smoking and research effort on health, from a biological standpoint, was shut down at RJR, correct?

A. That internal method development was stopped, the starch research that we talked about earlier was stopped. The laboratory was closed down, and biological testing was contracted to outside laboratories that had experience in that area.

Q. And the results of that testing were confiscated from the scientists, correct?

A. I don't know what you mean by "confiscated". I don't agree with that.

When a person leaves R.J. Reynolds, all of their information, laboratory notebooks, internal reports and everything, are left with R.J. Reynolds. It's not their personal property; it's the company's property. So that information then goes into the library.

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Q. They were not allowed to publish those results, were they?

A. I don't know of a case where they were told they couldn't, couldn't publish results. I think they were doing exploratory work trying to establish methods of exposing animals to cigarette smoke.

Q. And again, you've never, you've never seen the testimony of Mr. Bumgarner, correct?

A. No, I haven't.

Q. And I'm going to show you now what's been admitted -- I think, it's Exhibit 8018.

I'll place it in front of you, sir. This exhibit is a management bulletin, RJR Reynolds Tobacco Company, dated March 19, 1970.

And at the bottom it says, "Company to discontinue research in areas not related to tobacco or subsidiaries."

"The company today announced it would reduce its research force during the coming four months by some 26 specialties" -- "Specialists" -- I'm sorry -- "In fields not directly related to tobacco or subsidiary products and services."

That is a false statement; is it not?

A. I don't understand. In what sense?

Q. They were doing research on tobacco smoking and health; were they not?

A. Part of their function was to devise, develop test methods that could expose animals to cigarette smoke. A portion of what they were doing was starch research, where

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our subsidiary, called Penning-Ford -- At about that time we sold that company, and we were no longer doing starch research.

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Q. Maybe I'm missing it.

Do you see where it says "not directly related to tobacco"?

A. I see that.

Q. That is a false statement; is it not?

A. Well, I think I've already described what that laboratory did. So -- (pausing)

Q. It goes on to say: "The move represents a new direction which calls for the concentration of research efforts in fields in which the company is currently involved, such as tobacco and food."

The new direction was -- What?

A. I'm not sure I understand that sentence. "The move represents a new direction which calls for the concentration of research efforts in fields in which this company is currently involved, such as tobacco and foods."

I mean if I understand that right -- I'm not sure I do -- I think again it's the divestiture of certain businesses, including Penning-Ford; we were no longer doing that kind work.

Q. Look at the note. "Information about the reduction at the research development is being released to local news media today."

In other words, this is going out to the public, correct?

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A. I assume so.

Q. "If your employees ask questions about the story, assure them that the cutback applies only to people in specialized areas of research in which the company is no longer interested."

They were no longer interested in doing inhalation experiments -- Smoking on rats, correct?

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A. I don't agree with that, because we did contract that work out.
Q. So that statement is false, isn't it?
A. I think -- My understanding is that they contracted it out; they did not do that kind of work inside.
Q. That statement is false; is it not?
A. If you're suggesting that that's false because the company is no longer interested, at least in that portion of the work, the company certainly was interested.
Q. That statement is false, isn't it?
A. In a strictly-speaking way, yes
THE COURT: We need to change reporters now.
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